PAPERS AND DISCUSSIONS

THE GROWTH OF EXECUTIVE DISCRETION.

PROFESSOR FRANK J. GOODNOW,
COLUMBIA UNIVERSITY.

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The most notable point of difference between the English and continental administrative systems at the end of the eighteenth century was probably the relation which they bore to the judiciary. The English administrative system was characterized by its subjection to the control of the courts. The continental administrative system, as seen particularly in that of France, was marked by its freedom from judicial control.

The retention by each system of its characteristic feature may have been due to the conscious desire to secure judicial control or administrative independence, as the case might be. And yet the origin of the difference between the two systems is hardly to be attributed to any well-defined theory of government, but rather to a course of political development of which the leaders of political thought were in all probability not fully conscious. Thus, in England, the jurisdiction of the courts, to whose exercise the judicial control was due, was developed at a time when no clear distinction was made between judicial and administrative authorities, when the royal courts occupied toward the chief of administration, the crown, a position similar to that of all other governmental authorities, when the judges were like other officers subject to the disciplinary power of the crown, which might remove them from office at any time and bring pressure to bear upon them to secure decisions favorable to the royal interests. The development of a wide jurisdiction in the courts, under such

circumstances, did not involve a subjection of administrative action to a control exercised by bodies independent of the administration. For the crown could prevent the rendering of decisions unfavorable to its interests. The crown did not, therefore, try to limit the jurisdiction of the royal courts, but permitted them to exercise such powers as ultimately made them the highest and last instance of control over almost all governmental action.

Conditions on the continent were, however, quite the reverse of those which have been described. In France, thus, during the seventeenth century, administration was separated from justice more fully than was the case in England, and the *parlements*, as the most important judicial bodies were called, were composed of judges who occupied their posts for life, and were irremovable by the crown, because of the fact that the position of judge was bought and sold in very much the same way as military offices were bought and sold at a later date in England. In Germany also the most important courts were independent of the administrative authority. For the judges of these courts were appointed by the estates, while the most important administrative powers were exercised by the princes of the various states into which the Empire ultimately was divided.

Under these conditions the chief of administration, *i. e.*, the crown in France, and the prince in Germany, could not with due regard to his interests permit the development of a wide judicial control over administrative action, and we find in both France and Germany attempt after attempt on the part of the crown and prince to exempt certain administrative matters from the control of the courts. The ultimate result was the development of special tribunals on the continent for the decision of administrative cases, which tribunals were largely subject to the chief executive.

These facts account for the wide jurisdiction of the courts of England and the development of a narrow jurisdiction in administrative matters on the continent. Different as the development is on its surface, and important as the difference is in its effects upon the legal system and the political institu-

tions, nevertheless the main reason why the English courts exercised a control over administrative matters is to be found in the fact that the English courts formed a part of the administrative system of England, and as such were subject to the disciplinary power of the chief of administration, while the main reason why the continental courts did not exercise a control over administrative matters is to be found in the fact that they were not parts of the administrative system and were independent of the chief of administration.

In England, however, the Act of Settlement, enacted by Parliament in 1701, ushered in a new period in the history of judicial control over administrative action. This famous act, it will be remembered, provided that the judges of the royal courts should not be removed by the crown except upon the address of both houses of Parliament, thus giving to these officers a tenure not possessed by any other officers in the English system of government. The Act of Settlement had the further result of changing the character of the most important method of control over administrative action. This control, although theretofore exercised by bodies called courts, was really a control of an administrative character, because the bodies which exercised it were subject to the disciplinary power of the highest authority in the administration. It became, however, with the Act of Settlement, a judicial control, because it was exercised now by bodies which were hardly at all subject to an administrative disciplinary power.

Notwithstanding this change in the character of the control over administrative action, its extent was hardly lessened at all in the subsequent years. The jurisdiction of the courts was so well established that they continued to exercise it in the future as they had exercised it in the past. The reason why this was the case is probably to be found in the fact that the people had great confidence in the courts. As Professor Lowell says:

"'The gladsome light of jurisprudence,' as Coke called it, came with the king's courts, and hence it is not surprising that they supplanted the baronial courts, and in time drew before themselves all important lawsuits. . . . The same body of

judges, therefore, expounded the law in all parts of the realm, and hence England, alone among the countries of Europe, developed a uniform natural justice called the common law. The people naturally became attached to this law and boasted of the rights of Englishmen, while the courts that were the creators and guardians of the law became strong and respected."

In this way, then, England secured a judicial control over administrative action while the continent secured administrative independence. As a result of this independence the continent developed, particularly after the time of Napoleon, a much more efficient administrative system than England could develop under her régime of judicial control, and the study of administration and administrative methods assumed a place on the continent which it never reached in England, notwithstanding the subsequent development of administrative questions.

The English system of judicial control, *i. e.*, a control exercised by bodies independent of the executive, and from the point of view of its extent a wide one, became ours by inheritance along with other English institutions. For quite a time in our history it was developed rather than limited, being extended over legislative action through the power, which our courts soon began to exercise, of declaring acts of the legislature unconstitutional. At first no objections to its maintenance or extension over administrative action were made, for the reason that the period immediately subsequent to the formation of our constitutions was one which was characterized by great emphasis upon individual liberty. It was the age when the theory of the social compact and that of the natural rights of man had great influence on our law. Social conditions in this country at the time were comparatively simple. Much was expected from, and much was secured by, individual effort largely uncontrolled by law. Our growth was so rapid, industrial conditions became so complex, and social distinctions so marked, however, that by the latter part of the nineteenth century a change is to be noted in our attitude toward this question of judicial control.

It is to the change which has been introduced into our governmental system as a result of the attempt to substitute administrative independence for judicial control that I wish to call your attention this evening. My treatment of the subject will of necessity be somewhat legal in character. For here, as in so many other political problems, an investigation of the legal conditions is absolutely necessary to an adequate consideration and a successful solution of the question under treatment.

The most complex and difficult part of our governmental problem is that which is assigned to our national government. The management of our relations to other states, and of the national finances, the proper regulation of our commerce, the operation of such a vast commercial undertaking as our post-office, are all matters of such importance, magnitude and complexity as to call for the highest administrative skill and efficiency. In so far as those who are attending to these matters are subjected to the control of the courts, just in so far are they hampered in the discharge of their important duties, just so far is the administration of the departments under their charge made difficult and their action made slow.

For these reasons, perhaps, there has been a tendency on the part of Congress, from almost the beginning of our history, not to adopt in its complete form, as seen in England, the principle of judicial control over administrative action. This tendency is seen in the jurisdiction originally given to the federal courts. These bodies were not given as wide a jurisdiction as was given to the higher state courts. Thus it was provided that neither the Supreme Court of the United States nor the circuit or district courts should have original jurisdiction to issue such writs as *mandamus* and *certiorari* to compel or review action on the part of the officers of the United States government.[1] As jurisdiction in *mandamus* and *certiorari* is one of the most important means

[1] The United States Court of the District of Columbia has this jurisdiction, as the successor of the English Court of King's Bench through the Supreme Court of Maryland. But the territorial extent of its jurisdiction is confined to the District of Columbia.

by which the state courts exercise a control over state officers by forcing them to perform their duties and by reviewing their determinations, and as state courts may not issue these writs to federal officers, it will at once be seen what a position of administrative independence and freedom from judicial control has been accorded to federal officers as compared with the officers of the state government or with English officers.

Perhaps this omission from the judiciary act of 1789 of this jurisdiction was an accident. But whether that be the case or not, it is none the less true that Congress has never shown any disposition to remedy the omission, although the Supreme Court has several times called attention to the fact that neither it nor any of the circuit courts has this jurisdiction.

For quite a time Congress took no further action towards relieving the administration from judicial control. Its failure to act was probably due to the fact that no such further action was needed. No such action was needed because the functions of the national administration were not nearly so important as they are now. But, beginning with the Civil War, the national administration began to increase greatly in importance. This importance is seen particularly in the matter of the finances. The financial administration almost overshadowed the other administrative branches of the national government because of the enormous, both current and permanent, expenses which the war entailed.

The carrying on of the great governmental undertakings then under way made it necessary that the receipts be secured with a promptness and certainty which were impossible under a régime of extended judicial control. The result was an attempt in some instances to cut off all judicial remedies whatever, in others to make resort to them by the taxpayer more difficult. In their place, or as a necessary prerequisite to a resort to them, was provided an administrative remedy.

While this movement was particularly characteristic of the Civil War period, it would not be correct to say that there are no evidences of it prior thereto. Thus, in 1839, the action of Congress, as interpreted by the Supreme Court,[2] cut off the

[2] *Cary* v. *Curtis*, 3 How., 236.

most important judicial remedy in customs cases and substituted therefor an appeal from the decision of the collector of the customs to the Secretary of the Treasury. Later, it is true, Congress expressly restored the old judicial remedy, but it made resort to the administrative remedy of appeal to the Secretary of the Treasury and an adverse decision on that appeal, necessary prerequisites to resort to the judicial remedy. During the war similar remedies were provided for the extensive system of internal revenue taxation which was then developed. Since the time when this limitation of the judicial control was provided there has never been a time that the old system has been restored. In customs cases the Administrative Act of 1890 further limited the judicial remedy, providing for customs cases special tribunals similar to the tribunals provided in France and Germany in the seventeenth and eighteenth centuries for the trial of administrative cases. These are the boards of general appraisers, whose members may be removed at any time by the President,[3] whose decisions are made without a jury, are final in matters of appraisement, but may be reviewed by the courts when they relate to classification.

While the Judiciary Act of 1789 did not give the federal courts jurisdiction in *mandamus* and *certiorari*, it still permitted them to issue the injunction, a most potent means of judicial control over administrative action.[4] But when Congress came to organize the new system of taxation made necessary by the war, it came to the conclusion that it was unsafe to subject the action of the revenue officers of the government to the control of the courts through the issue of the injunction, and therefore expressly forbade the courts to issue any injunction to restrain revenue officers from collecting the revenue.[5]

[3] *Shurtleff* v. *United States*, 189 U. S., 311.

[4] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94.

[5] The Supreme Court has interpreted this statute as preventing the courts from issuing the injunction in tax cases to government officers (*Snyder* v. *Marks*, 109 U. S., 189), but has, nevertheless, permitted the courts to issue it to private parties although the issue of the writ actually has the effect of preventing the collection of taxes. This was done, for example, in the in-

The result of this development has been to relieve officers of the national government, in the exercise of one of the powers most restrictive of private right, from the judicial control which, under the old English system, was exercised over them. For the remedies open to the individual are sometimes so difficult of application that he will pay the tax rather than go to the expense and trouble of contesting it. Thus, for example, in the case of certain stamp taxes, such as the tax imposed recently on deeds and mortgages, almost the only way one could secure an appeal to the courts was to refuse to affix the stamp required by law and run the risk of a criminal prosecution. Certainly the Supreme Court has held that the purchase of the stamp, its affixing to the document, even if accompanied by a protest to the collector, is a voluntary payment and that the judicial remedy is not available in the case of taxes voluntarily paid.[6]

The curtailment of the former judicial control over administrative officers is noticeable also in cases other than those already mentioned. The recent cases decided in the Supreme Court relative to the power of administrative officers of the national government to make conclusive determinations which are not susceptible of review by the courts are examples of this tendency to relieve administrative officers from judicial control.

Thus, it has recently been held that Congress may constitutionally vest—and as a matter of fact has actually vested—in administrative officers the conclusive determination of the existence of the facts which justify the deportation of an alien,[7] and that in the case of persons of Chinese parentage, the power of determining finally that such persons are not native-born American citizens may be constitutionally, and as a mat-

come tax cases. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429. Congress has also enacted legislation which takes from the individual the right to bring actions for tort or in replevin against the tax officers of the federal officers because of their performance of their duties. See the opinion in *De Lima* v. *Bidwell*, 182 U. S., 1.

[6] *Chesebrough* v. *United States*, 192 U. S., 253.

[7] *Ekiu* v. *United States*, 142 U. S., 651.

ter of law is actually, vested in the administrative officers of the government, although such persons of Chinese descent are, as a result of such determination, prevented from coming to this country, which they claim to be the land of their birth.[8]

Again, it has been held that the determination by an administrative officer that property shall be destroyed because imported into the United States contrary to the provisions of a statute and treasury regulations passed in pursuance thereof, need not by the constitution, and may not under the statute of Congress, be reviewed by the courts.[9]

The Supreme Court has even gone so far as to hold that, although the person owning such property has not been accorded a hearing before the determination was reached which held that the property was imported contrary to law, and although the order decreeing the destruction of the property has been made without the intervention of a judicial body, the person owning such property has not been deprived of his property without due process of law.

Finally, the Supreme Court has held that the determination that the facts exist which under the statute justify the exclusion of certain articles from the mails, cannot under the law be reviewed by the United States courts,[10] and has intimated that determinations of this character which involve mixed questions of law and fact are, when made by the administrative authority having jurisdiction by statute, conclusive and not subject to judicial review.[11]

Time does not permit of the attempt to set forth the reasoning by which the Supreme Court endeavors to justify these decisions. Nor indeed is the attempt to set forth this reasoning necessary. For what concerns us on this occasion is merely the fact that these decisions have been made. For this fact is indicative of the tendency to which it is the purpose of this paper to call attention.

[8] *United States* v. *Ju Toy*, 198 U. S., 253.

[9] *Buttfield* v. *Stranahan*, 192 U. S., 470.

[10] *Bates & Guild Co.* v. *Payne*, 99 U. S., 106.

[11] *Public Clearing House* v. *Coyne*, 194 U. S., 497.

Before leaving this point, perhaps mention should be made of the power which administrative officers have to enforce their determinations. Two methods are distinguishable. The one is by judicial process; the other is by summary administrative proceedings. So far as enforcement by judicial process is the rule, the method of enforcement in and of itself provides for a judicial control, since administrative officers have to apply to the courts to enforce their orders, and the courts may on such application refuse to act on the ground that the orders are illegal. So far as enforcement by summary administrative proceedings is the proper method, in order that there may be judicial control provision must be made for it in some other way, as by *certiorari*, injunction, or by an action for damages against the officer taking action.

At a very early time in our history it was decided that summary administrative proceedings for the enforcement of debts due the government from its officers were constitutional.[12] Later similar proceedings were upheld for the collection of taxes even where such collection resulted in the sale of the real property of the tax-payer,[13] and at the present time the statutes of Congress confer large powers on collectors of the revenue to collect the taxes due the United States by this method.

When we take these summary methods into consideration and remember that almost all the ordinary remedies by which the courts, on the application of the taxpayer, may exercise their control over actions of revenue officers, have been rendered less effective, if not taken away altogether, we see what an independent position has been accorded by the law to the officers of the United States government who are engaged in the collection of the revenue, and that the tendency is to put the other officers of the government into a similar position of independence.

[12] *Murray's Lessee* v. *Hoboken Land and Improvement Company*, 18 Howard, 272.

[13] *McMillen* v. *Anderson*, 95 U. S., 37; *Springer* v. *United States*, 102 U. S., 586.

What is true of the United States administrative officers is apparent in the case of the officers of the state governments. Attention has already been called to the fact that at the end of the eighteenth and the beginning of the nineteenth century great emphasis was laid on bills of rights, as they were called, which were expected to curtail the power of all branches of the government in their dealing with what were considered to be the natural rights of man. The effectiveness of these bills of rights was, however, in large measure, dependent upon the courts, which came to be regarded as having the power to declare unconstitutional all government acts, even those of the legislature, which they regarded as infringing the rights of the individual as guaranteed by the constitution. For quite a time in our history the courts were inclined to make large use of the powers with which they considered themselves to be endowed, but within the last generation they have developed the idea that there exists in the legislature a power not in any way limited by the constitutional provisions protecting private rights. This power is called the police power. It may be exercised by the legislature and by administrative officers in their attempts to enforce statutes of the legislature without making any compensation to the individual for the expense to which he may be put by their orders. The extent to which the sphere of individual rights has been subjected to government regulation and relieved from judicial protection is of course dependent upon the view taken by the courts as to the content of the police power. This is, however, a subject whose extent and intricacy make it impossible to attempt to go into it on such an occasion as this. It may, however, safely be said that its extent is recognized by the courts to be far greater than they at one time considered it to be. Thus the decisions of the New York Court of Appeals have upheld the right of the legislature to give to administrative officers the power to force owners of tenement property, which, at the time of the passage of the law giving the power, complied in all respects with the law, to make improvements in their property by the introduction of new kinds of plumbing, even where the introduction of such plumbing results in the expenditure of a substan-

tial sum of money.[14] The right to liberty is no more protected from the operation of the police power than is the right to property. Thus, the Supreme Court of the United States has just held that the right to liberty guaranteed by the Constitution is not violated by the provision of compulsory vaccination.[15]

The subject of the control of the state courts over the administrative officers of the state government, so far as it is affected by the question of remedies, is a very large one. Its history necessarily involves a history of judicial procedure. The conditions, furthermore, are so different in different states that it is doubtful if any general conclusions of value can be derived from a study of remedies. It may, however, be said that, in the most complex conditions which are to be found, such as those existing in the cities, a tendency is observable similar in character to the tendency in the legislation of the United States national government, already noticed, towards according greater freedom to administrative action, notwithstanding the greater extent of that action which is necessitated by the presence of the problems incident to municipal life.

In spite of the constitutional provisions protecting property, we find the courts upholding in their decisions more and more arbitrary action on the part of administrative officers having to do with the public health and safety of the community. Thus, the courts of New York have in recent years upheld, in almost all instances, the constitutionality of legislation conferring upon administrative officers powers relative to tenement-houses and the public health generally. Health officers in almost all the states are permitted to proceed to the making and enforcement of nuisance-removal ordinances, as they are called, without notice and an opportunity to be heard on the part of the persons affected by them. The old idea that a jury trial is necessary to the determination that a nuisance exists

[14] *Department of Health* v. *Trinity Church*, 145 N. Y., 32.

[15] *Jacobson* v. *Massachusetts*, 197 U. S., 11. See also *In re Veemeister*, 179 N. Y., 239; *State* v. *Jacobson*, 183 Mass., 242; *State* v. *Hay*, 126 N. C., 999.

has been almost completely abandoned. Action of health officers in taking children believed to be affected with a contagious disease from their parents' arms, after the door of the house in which they lived had been broken in, and consigning them into a pest-house has been sustained as legal.[16] Health officers have been recognized as possessing the power to force, either certain classes of the population, or the entire population of certain districts, to submit to vaccination, where in their opinion there is danger from smallpox.[17]

There is a tendency, further, towards upholding as constitutional the finality of administrative determinations made after a hearing. Such a tendency is perfectly clear where the determination reached involves merely questions of fact, as *e. g.*, the assessment of property for taxation, and is noticeable even in cases where the questions involved are questions of mixed law and fact, as, for example, the determination as to whether given conditions constitute a nuisance. The only exception to such a tendency is either the provision of a new remedy or the remodeling of an old remedy so as to permit of a direct appeal to the courts against administrative determinations, while recognizing their finality in collateral judicial proceedings.[18]

Notwithstanding this exception to the general tendency, it is still true, however, that both in the national government and in the state governments, but particularly in the former and those portions of the latter having to do with municipal life, the powers of administrative officers are, on the whole, broader and much less subject in their exercise to judicial control than they formerly were.

[16] *Haverty* v. *Bass*, 66 Me., 71.

[17] *Morris* v. *Columbus*, 102 Ga., 792; *Abeel* v. *Clark*, 84 Cal., 226; *Duffield* v. *School District*, 162 Pa. St., 476.

[18] This exception is quite marked in the tax cases where a direct remedy against assessments is very commonly provided. Furthermore, in some cases the province of the writ of certiorari, the most important common law remedy for the review of administrative determinations, has been sometimes so extended by legislation as to offer to the individual affected by an administrative determination the right to a judicial review of it even as to questions of fact.

So great, indeed, has been the change in this respect that some people are inclined to believe that we of the present day are departing from the faith of our fathers, and deplore a change which, if continued, will be apt to place us on a par with the people of continental Europe, who, many of us are accustomed to believe, do not enjoy the same sphere of individual freedom with which we consider that we are blessed.

What now is the explanation of this change in one of the important principles of Anglo-American legal philosophy? Why do we tend towards greater administrative power and greater freedom of administrative officers from judicial control?

Is not the reason to be found in the fact that the original English idea of judicial control over administrative action was worked out at a time when industrial and other social conditions were comparatively simple? and that such a system of control was in reality suitable only to such conditions? The greater administrative freedom to be found on the continent during the same period may well have been due to the more complex industrial and social conditions which we are told existed there.[19] At the time the judicial control was developed in England that country was many years behind the continent in industrial development.

Our conditions were naturally less well developed than were even those of England at the time we adopted the idea of judicial control of administrative action, and the change in them, which is evident to any one who examines them, has brought it about that we have enlarged the sphere of administrative action and curtailed the judicial control of that action, although in so doing we have seriously curtailed the sphere of individual freedom. It may, perhaps, be the case that the curtailment has been greater than is either desirable or necessary. However that may be, it is certainly true that large judicial control over administrative action is incompatible with administrative efficiency, and the days in which we live, the days of

[19] Cunningham: Growth of English Industry and Commerce (1892), vol. ii, p. 347.

the factory and the mine, the railroad and the great industrial corporation, the tenement-house and the slum, make greater social control over individual action an absolute necessity. Effective social control is possible only where the administration is efficient. That being the case, it is inevitable that judicial control over the administration must be curtailed.

While, therefore, in some exceptional instances judicial control over administrative action may be restored, while in certain more exceptional instances it may be extended, it can hardly be doubted that the future will see that control on the whole diminish rather than increase, notwithstanding that the action of administration officers may be more extensive than ever before in the history of Anglo-American institutions. We have passed through an age of constitutional private rights and are approaching one of social control. What needs emphasis is no longer the inherent natural rights of the individual, but the importance, indeed the necessity, of administrative efficiency. For upon administrative efficiency depends the effectiveness of that social control without which healthy development in existing conditions is impossible.

But while one of the main means by which such efficiency may be secured is the grant to administrative officers of greater freedom of action, it is to be remembered that this is not the only or probably the most important means. We must recognize as well that an efficient administration must be kept out of politics. That we have as a matter of fact recognized the importance of this principle is seen in the success which the movement for reform in the civil service has had. It is seen also in the greater permanence accorded those positions in the government service involving the discharge of duties of a technical and professional character, such as the position of teacher, member of scientific bureau, policeman and fireman.

When we have fully recognized the importance of an efficient and upright administration and have also recognized that an administrative officer is following a profession rather than occupying a "place," the problem of the proper protection of private rights, and the according to the administration the necessary freedom of action will be much nearer solution.

For we shall then have secured an administrative service which will not need to be subjected to judicial control in order to be made regardful of private rights. This service will then have that freedom of action so necessary to its efficient exercise of those powers of social control with which it must be endowed, if we are to hope to secure the highest public welfare in the industrially and socially complex age in which we are living.